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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 79-1844

DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF WASHINGTON, et al.,

Petitioners,

v.

THURSTON COUNTY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Petitioner Department of Natural Resources of the State of Washington prays that a writ of certiorari issue to review the judgment and opinion of the Washington State Supreme Court entered on October 4, 1979 which became final when a timely petition for reconsideration was denied on February 20, 1980.

OPINION BELOW

The Department of Natural Resources of the State of Washington is the trustee for lands conveyed to the State of Washington by the United States pursuant to 25 Stat. 676, § 14, for the benefit of the University of Washington. The department, to produce income for the University,

leased a fourteen acre tract situated adjacent to Lake Lawrence in Thurston County, Washington. The lease was issued, after public auction as required by State law, to Lake Lawrence, Inc. for the planned development of the tract into recreational residences.

In 1977 Lake Lawrence, Inc. applied to Thurston County, a political subdivision of the state, for approval of a preliminary plat and shoreline substantial development permit. Thurston County refused to issue a shoreline substantial development permit. Thurston County's refusal was subsequently reversed by the State Shorelines Hearing Board, a state administrative agency. Its decision is reproduced in A-16. Thereafter, Thurston County did not appeal the decision of the Shorelines Hearing Board but nevertheless continued to refuse to grant the substantial development permit and to approve the plat.

The petitioner and Lake Lawrence, Inc., the lessee, sought in trial court proceedings to compel Thurston County to grant the requested permit and plat approval, and alleged that the county's refusal constituted a taking of property without compensation. The trial court, while resolving the matter in favor of the petitioner, did not reach the question of whether there had been a taking of public trust property by the imposition of the challenged land use restriction.

Subsequently, Washington State Supreme Court in *The Department of Natural Resources, et al. v. Thurston County, et al.*, 92 Wn.2d 656, 601 P.2d 494 (October 4, 1979) reversed the trial court. [Reproduced in the Appendix A-1] The Washington State Supreme Court affirmed Thurston County's action and assumed there had been no taking of public trust property. A timely petition for rehearing was filed on October 23, 1979 and was denied February 20, 1980.

QUESTIONS PRESENTED

(1) Does a state agency, as trustee of lands conveyed by the federal government for specific purposes, have standing to contest land use restrictions imposed by a unit of local government on such trust properties?

(2) Is a public trustee landowner, or its lessee, entitled, by Fifth Amendment and Fourteenth Amendment protections against the taking of property without compensation, to an opportunity in a judicial proceeding to challenge a land use restriction on the basis that it amounts to a taking of property?

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:
(a) Amendment Five A-34
(b) Amendment Fourteen A-34
Washington State Constitution
Article XVI, Section 1 A-35

STATUTORY PROVISIONS

United States:
25 Stat. 676 § 14 (Enabling Act, State of Washington A-35
Washington State
Revised Code of Washington 43.79.060 A-36

STATEMENT OF FACTS

On November 11, 1889 the State of Washington was admitted into the Union. A part of the admission procedure mandated by Congress involved the setting aside of large tracts of land for specified purposes. Generally, the State of Washington acquired every Section

16 and 36 in every Township within the State for the benefit of the common schools of the State of Washington. Other tracts of land were set aside and dedicated to specific beneficiaries. The fourteen acre tract of land called "Wood Point" was included within a 200,000 acre grant to the State of Washington for the purpose of supporting a state university. 25 Stat. 676, § 14. The property has been placed under the management of the Department of Natural Resources by the State Legislature which is required to manage it for the purpose of producing income for "university purposes." Enabling Act, § 14, *supra*. The University of Washington is the beneficiary of all monies derived from these lands. RCW 43.79.060.

On September 1, 1976 the Department of Natural Resources leased a fourteen acre tract on Lake Lawrence to Lake Lawrence, Inc. for a term of fifty-five years. The lease authorized Lake Lawrence, Inc. to subdivide the subject tract, in accordance with the land use designations then in effect by Thurston County, and develop the site for recreational residential purposes. Lake Lawrence, Inc.'s proposed development was in accordance with the zoning restrictions.

Lake Lawrence, Inc. made application to Thurston County for approval of its proposed plat for subdivision of Wood Point into residential lots and for a substantial development permit. The substantial development permit is required, under state law, for any project or activity within two hundred feet of a shore line or stream. After a series of studies and environmental reports were completed, Thurston County denied both the requested plat approval and the substantial development permit. Under state law, the Shorelines Hearing Board possesses jurisdiction to hear and determine appeals from denial of a requested substantial development permit under the State Shoreline Management Act, RCW ch. 90.58. After four days of a contested case hearing, the Shorelines Hearing Board issued its unanimous decision on March 23,

1978 reversing the decision of the county to deny the requested substantial development permit for the Wood Point development. (A-16). Although entitled to do so, Thurston County did not avail itself of the right of appeal of the Board's decision to the courts of Washington afforded by RCW 34.04.130(2).

Instead of issuing the substantial development permit as ordered by the State Shorelines Hearing Board and approving the requested plat, Thurston County unilaterally conducted additional hearings on these questions. Thurston County concluded that Wood Point was significant eagle habitat and, in disregard of the Shorelines Hearing Board decision, denied the requested permit and plat approval on that ground.

The Department of Natural Resources and its lessee, Lake Lawrence, Inc., filed an application for a writ of mandamus, an application for a writ of review and an application for a writ of prohibition against Thurston County in the trial court. (A-26).[1]

The parties agreed the issue before the court involved the constitutional and legislative authority of Thurston County to refuse to issue the requested permit and approve the requested plat. All other issues were reserved. The trial court entered Findings of Fact and Conclusions of Law.(A-29).The trial court ordered the county to issue the requested substantial development permit and approve the plat in a configuration as determined to be environmentally satisfactory by the State Shorelines Hearing Board. Conclusion of Law No. 3.9 states:

> "After balancing the public interest in legitimate government regulation of the use of property versus the rights of petitioners to their proposed use of Wood Point, the court concludes that alleged public interest in maintaining perching sites for eagles on

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[1]The writ of prohibition was sought because of the county's threatened downzone of Wood Point during the pendency of the appeals.

> the Wood Point property does not justify the denial of the proposed plat, *and would constitute an unconstitutional taking.*" (Emphasis supplied). (A-33)

Legal arguments were directed to the authority of Thurston County to disregard the Shorelines Hearing Board decision. The trial court found it unnecessary to address the question of whether there was a "taking" of Wood Point by imposition of the land use restriction in question because it overruled the county's legal arguments on its authority to deny the substantial development permit and the plat approval. Thus, no evidence was received by the trial court on the "taking" issue.

The failure of the Washington State Supreme Court to remand this matter to the trial court to give both the Department of Natural Resources and its lessee, Lake Lawrence, Inc., a hearing on the question of the "taking" of their property without compensation is in violation of petitioners' federally protected rights.

REASONS FOR GRANTING WRIT

Petitioner is snared in a trap constructed by the court below. Under federal law, the Department of Natural Resources has the obligation to manage Wood Point to produce income for "university purposes." 25 Stat. 676, §14. Pursuant to the Federal Enabling Act for statehood, and accepted by the State of Washington by its Constitution, Article XVI, § 1, the state is to act as trustee to fulfill the purposes of the federal land grants, which include the property here in question. The Enabling Act and the State Constitution have formed a compact between the State of Washington and the federal government to carry out those purposes. See *Cooper v. Roberts*, 59 U.S. 173 (1855).

This Court in *Lassen v. Arizona Highway Department*, 385 U.S. 458, 467-68 (1967) ruled that the state, as

trustee for federally granted lands, is to manage them to "* * * provide the most substantial support possible to the beneficiaries, and that only those beneficiaries profit from the trust." But the court below ruled that the imposition of the restriction upon use in question could not be challenged by the Department of Natural Resources because "* * * there can be no unconstitutional taking when the property taken is public and not private." (92 Wn.2d at 668). The state court's conclusion disables the Department of Natural Resources from effectively protecting trust lands placed under its charge from takings or other damaging of such trust lands. The petitioner should have the ability to protect such lands at least on the same basis as are available to private property owners. Such a legal disability, if allowed to stand, will create a serious problem in carrying out the trust responsibility of the state by its Department of Natural Resources managing thousands of acres of statehood trust land. The obligation of the Department, as trustee, requires that it afford to granted trust lands no less protection than that afforded to similarly situated private lands. Anything less amounts to a legal disability of the trustee from preventing violation of the federally mandated trust duties. See: *United States v. 111.2 Acres,* 293 F. Supp. 1042 (D.C.E.D. Wash. 1968); aff'd 435 F.2d 561 (9th Cir. 1970).

In addition to the significant federal issue presented regarding the Department's standing to protect trust lands, we submit that this Court's acceptance of jurisdiction in *Agins v. City of Tiburon,* October Term, 1979, No. 79-602, provides a logical basis for reviewing the questions presented by this petition for certiorari. In *City of Tiburon, supra,* question 3 reads:

> "Where a state regulation recites that certain uses can be made of private property does the property owner have a right under the Fifth and Fourteenth Amendments to allege and prove that those recited

> uses are neither possible nor feasible and that he, therefore, has no available use at all?"

In this proceeding, the trial court ruled that the county was bound by the State Shorelines Hearing Board decision and thus it was obligated to issue the necessary permits. Only if the trial court had rejected the petitioners contention would it have been necessary to proceed with the question of whether the land use restrictions constituted a "taking" of property without compensation.[2] The Washington State Supreme Court reversed the trial court and assumed the conclusion that might have been reached on the "taking" question thus depriving the petitioner, and its lessee, the opportunity to present evidence to prove that the land use restrictions in question precluded other feasible and possible uses of Wood Point. The question presented for review in *City of Tiburon, supra,* is intimately connected to the questions presented for review by this petition. The failure of the State Supreme Court to grant a remand to the trial court for consideration of the taking question has violated the federally secured rights of petitioner.

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[2]Although the trial court did not consider evidence on the question of whether there was a "taking" of property, the court did observe that the basis for the county's refusal "does not justify the denial of the proposed plat, and would constitute an unconstitutional taking." (A-)

The errors complained of have a significant impact upon the prudent management and administration of federally granted lands in the State of Washington. We, therefore, respectfully submit that this application for writ of certiorari be granted.

DATED this 16th day of May, 1980.

Respectfully submitted,

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[No. 45816. En Banc. October 4, 1979.]

THE DEPARTMENT OF NATURAL RESOURCES, ET AL, *Respondents*, v. THURSTON COUNTY, ET AL, *Appellants*.

[1] Plats — Environment — SEPA — Plat Approval — Power of Local Government. When considering a preliminary plat of a subdivision, a local governmental decision-making body is required by the State Environmental Policy Act of 1971 to consider environmental effects and is empowered by SEPA to deny the plat on environmental grounds.

[2] Plats — Environment — Shoreline Management — Approval of Permit — Effect Upon Plat Proposal. A finding

of the Shorelines Hearings Board that a proposed preliminary plat is adequate for granting a shorelines substantial development permit is relevant only to the jurisdiction of the board under the shorelines management act and does not preclude a local governmental decision-making body from denying the plat upon environmental considerations.

[3] **Statutes — Constitutional Challenge — Vagueness — Application.** Only regulatory statutes prohibiting certain types of conduct and imposing sanctions for violations of their standards may be challenged for vagueness.

[4] **Environment — SEPA — Delegation of Powers — Validity.** The substantive authority delegated by SEPA to local governmental bodies to apply environmental standards when making land use decisions is a valid delegation of legislative power.

[5] **Eminent Domain — Constitutional Taking — Public Property.** An unconstitutional taking of property for public use without just compensation can occur only when the property taken is private rather than public.

[6] **Eminent Domain — Constitutional Taking — Determination.** When determining whether governmental action constitutes a taking of private property, a court will balance the public interest in regulating the use of the property against the private interests infringed upon. In determining the degree of infringement of the private property interests, the court will consider the type of encumbrance imposed and whether the owner thereafter can adapt the property to a reasonably profitable use.

STAFFORD, J., did not participate in the disposition of this case.

Nature of Action: A private developer and a state agency, the agency having leased land bordering on a lake to the developer, sought review of a decision by a board of county commissioners denying their application for a preliminary plat and a shoreline substantial development permit on environmental grounds. Following an order of the Shorelines Hearings Board reversing the denial of the shoreline development permit, the plaintiffs further sought a writ of mandamus to compel the commissioners to issue the shoreline development permit and to approve the preliminary plat.

Superior Court: Consolidating the actions for review and mandamus, the Superior Court for Thurston County, Nos. 58623, 59975, Richard L. Pitt, J., on September 25, 1978, ordered the commissioners to issue a shoreline development permit and to approve the preliminary plat.

Supreme Court: Holding that the commissioners had independent authority under SEPA to deny the plat for environmental reasons despite inconsistent findings of the Shorelines Hearings Board, and finding that the denial of the preliminary plat did not constitute an unconstitutional taking of private property for public use without just compensation, the court *reverses* the judgment.

Patrick D. Sutherland, Prosecuting Attorney, and *Alexander W. Mackie, Special Deputy,* for appellant Thurston County, et al.

Thomas H. S. Brucker, Roger M. Leed, and *Smith, Brucker, Winn & Ehlert,* for appellant Lake Lawrence Public Lands Protection Association, et al.

Slade Gorton, Attorney General, and *J. Lawrence Coniff, Jr., Assistant,* for respondent State.

Philip P. Malone, for respondent Lake Lawrence, Inc.

Slade Gorton, Attorney General, Charles B. Roe, and *Robert V. Jensen, Assistants,* amici curiae.

HOROWITZ, J.—The central issue raised by this appeal is whether the Thurston County Board of County Commissioners, considering whether to deny a preliminary plat on environmental grounds, is bound by a finding of the Shorelines Hearings Board in a related proceeding that the plat is adequate to protect the environmental resource. We hold the County Board is not precluded from reaching a different conclusion on the environmental issue and denying the plat, and that the Board's decision to deny the plat did not violate the applicant's constitutional rights. We accordingly reverse.

At issue here is the proposal of Lake Lawrence, Inc., to develop a 14–acre parcel of land known as Wood Point on the shore of Lake Lawrence, a small lake in Thurston County. The shoreline of the lake is presently only partially developed. Wood Point is in a natural state, covered with second–growth timber and dense underbrush. It is designated a "rural environment" in the county's Shoreline Master Program, allowing low–intensity land use, with residential development not exceeding two dwellings per acre. Title to the property is held by the State Department of Natural Resources in trust for the University of Washington. Desiring to make the land income–producing, the Department leased it to lake Lawrence, Inc., for a term of 55 years. The parties intended that the lessee would develop the land into single–family residential units.

In January 1977 Lake Lawrence, Inc., applied to the County Board of Commissioners (the Commissioners) for approval of a preliminary plat and shoreline substantial development permit for its project. In the ensuing months the County Planning Commission gathered evidence and testimony regarding the proposal. A draft environmental impact statement (EIS) was prepared, public hearings were held, and in May 1977 a final EIS was filed with the Planning Department. During the course of this investigation it became known to county planners that bald eagles use the Wood Point site for perching and feeding from the well–stocked lake. The EIS documented environmentalists' concern over the eagle habitat, and the conclusion of at least one consultant that development of Wood Point could drive bald eagles from the area. After visiting the site to observe perching eagles the planning staff recommended denial of the plat application. The Planning Commission itself, however, lacked a quorum to render a decision at its July 1977 meeting, and thus forwarded the proposal to the Commissioners with no recommendation.

The Board of County Commissioners held two public hearings on the plat proposal in August and September

1977. On the date of the second hearing the developer submitted a revised plat intended to provide more protection to the wildlife habitat, particularly to the trees identified as favored perching sites for the eagles. The revised plat set aside three lots on the shoreline as an eagle preserve and created a 75–foot buffer zone along the shoreline, but maintained a density of 22 residential units in the 14–acre parcel. After receiving testimony from environmental experts as well as members of the community, the Commissioners voted unanimously to deny the application for a preliminary plat and shoreline development permit. The denial was based on the eagles' status as endangered birds in Thurston County, the County's comprehensive plan calling for preservation of the County's wildlife, and the Department of Game's recommendation that a buffer strip of 200 feet or more be required to preserve the site's value as a bald eagle habitat. The proposed plat does not provide such a buffer between the eagles' preferred perches and human habitation or development, and it also allows substantial development between these perches and a marsh area which is critical to the eagle habitat. The commissioners also voted at the September meeting to request the Planning Department to reconsider the master program designation of the area as rural in light of the evidence of its use as a habitat for endangered birds.[1]

Lake Lawrence, Inc., and the Department of Natural Resources (hereinafter referred to as respondents) sought review of the Commissioners' action through two separate and appropriate means. Review of the plat denial was sought in the Superior Court for Thurston County pursuant to RCW 58.17.180, a provision of the platting statute which provides for judicial review of any decision approving

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[1]Contrary to respondents' contention, the Commissioners' request does not amount to an attempted rezone or spot–zone. It is not in itself a zoning action. Nor does it create a classification different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan which governs here. *Cf. Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969).

or denying a plat. Review of the denial of the shorelines substantial development permit was sought before the Shorelines Hearings Board (the Board) pursuant to RCW 90.58.180, a provision of the Shoreline Management Act of 1971 (the SMA).

In February 1979, before the matter of the plat denial had come to trial in Thurston County Superior Court, the Board held a hearing on the denial of the shoreline development permit. The Board received substantial testimony regarding the proposed project and the environmental issues it raised. In its findings of fact the Board noted that bald eagles have long been observed at Lake Lawrence and the lake is an incidental perching area for these eagles. The Board also found that preservation of the perching trees together with a surrounding buffer was a proper condition of development of Wood Point. The Board found, however, that setting aside three waterfront lots as an eagle preserve, and maintaining a 75–foot buffer area along the shoreline provides adequate protection against significant adverse effect to the eagles. The Board concluded the proposed substantial development in the shoreline is consistent with the County's master program and the SMA, and that a permit for the shoreline development should not be denied. The Board's order thus reversed the denial of the shoreline development permit and remanded to the County for further proceedings.

Following the Board's decision the Commissioners moved in Superior Court to have the record on review of the plat decision returned to permit reconsideration. After the motion was granted and the record returned, the Commissioners called another public hearing to take additional testimony and to reconsider approval or denial of the plat based on the new evidence and the Board's decision. On April 24, 1978, after hearing additional testimony, visiting the site, considering the record and arguments of counsel, and considering an alternate configuration for the project which preserved the 22–unit density, the Board once again

unanimously denied the preliminary plat. The Commissioners entered detailed findings of fact and conclusions of law, and gave specific reasons for its denial, thus meeting the requirements for specificity imposed by this court in *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978), which had been decided in the interim between the Commissioners' first and second votes on the plat.

The Commissioners disagreed with the Shorelines Hearings Board that the plat was adequate to protect the eagle habitat, finding it would be disruptive to feeding and perching activities and would not assure continued availability of the site to the eagles.[2] The Commissioners detailed at length the features of the plat proposal which are unacceptable, particularly the developer's insistence that 22 residential units be included. The Commissioners concluded such a plan could not adequately mitigate the adverse effect on the birds, that the proposal was not in the "public interest" within the meaning of the platting statute, and that the plat must therefore be denied.

Following this second denial of the preliminary plat the respondents filed a petition in Superior Court for a writ of mandamus to compel the Commissioners to issue a substantial development permit and to approve the plat. The petition was initially denied on the ground there was an adequate remedy at law. At the same time the court granted the motion of Lake Lawrence Public Lands Preservation Association, an association of interested local citizens, to intervene. At trial the court considered the full record before the Commissioners on remand, and also allowed respondents to reargue their mandamus claims. Upon entering findings of fact and conclusions of law, the court issued an order directing the Commissioners to issue a substantial development permit and to approve the preliminary plat.

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[2]The Commissioners did not appeal the Board's finding, concluding the issuance of a shoreline substantial development permit was rendered moot by the denial of the plat.

The court's findings which are central to this appeal are: (1) the Commissioners are bound by the Shorelines Hearings Board's finding that the proposed plat is adequate to prevent any significant adverse effect on the eagles using the site; (2) the Commissioners have no authority under the platting statute to deny a plat on environmental grounds, and the authority to do so under the State Environmental Policy Act of 1971 (SEPA), RCW 43.21C, was preempted by the Board's decision on the matter; (3) the Commissioners' application of the "public interest" clause of the platting statute to deny the plat on environmental grounds renders the clause unconstitutionally vague; and (4) denial of the plat to preserve the perching and feeding site for the eagles is an unconstitutional taking.

We hold the Commissioners are not bound by the Shorelines Hearings Board finding, and that they have independent authority under SEPA to consider the environmental issue and deny the plat for environmental reasons. We further hold that denial of the plat in this case does not violate respondents' rights to due process, or constitute a taking of private property for public use without compensation.

I

[1] The central question which emerges from this complex case is whether the Commissioners have the authority to deny a preliminary plat on environmental grounds and, if so, what effect the Shorelines Hearings Board's finding had on the Commissioners' authority here. There is no longer any question that a governmental decision-making body whose deliberation is subject to the requirements of SEPA is empowered by that act to deny a project application on environmental grounds. In *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978) this court recognized this substantive aspect of SEPA as a supplement to all other statutory authorization. The procedural requirements of SEPA for consideration of the environmental effects of proposed developments will not be rendered

meaningless by denying the authority of the decision maker to reject a proposal on the basis of the adverse environmental effects it has discovered through the process. *See* RCW 43.21C.060, a provision of SEPA recognizing the authority of the governmental decision–making body to condition or deny a request for action on the basis of specific adverse environmental impacts.

Similarly, there can be no question of the application of SEPA to the plat–approval process. The Thurston County Board of County Commissioners is required by SEPA to deliberate on environmental concerns as a part of the platting decision process. *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973). The requirement of the platting statute in RCW 58.17.110 that the County Commissioners determine if "the public use and interest will be served by the platting" in fact serves to emphasize the significance of early inquiry into environmental matters. *Loveless v. Yantis, supra* at 765.

As noted in *Loveless*, the absence of environmental criteria from the platting statute is immaterial, for the obligation and authority to consider such matters is provided by SEPA.

As we have repeatedly pointed out, SEPA is an overlay of law which supplements existing statutory authority. *See for example Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 586 P.2d 470 (1978); *Polygon Corp. v. Seattle, supra; Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976); *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 513 P.2d 36, 76 A.L.R.3d 360 (1973). Thus, it makes no difference that the platting statute does not provide explicit authority to deny the plat on environmental grounds, because SEPA does provide such authority. The Commissioners here were required by SEPA to consider the possible adverse impact of the proposed plat on the use of Wood Point for eagle perching and feeding, and were empowered by SEPA to deny the plat on the ground the

adverse impact was too great. The question remains, however, what legal effect the Shorelines Hearings Board's finding had on the Commissioners' reconsideration of the plat.

It is respondents' contention that the Commissioners were bound by the Board's finding that the proposed plat provided adequate safeguards to protect the eagles, since they took no appeal from the Board's decision. They maintain the Commissioners were thus barred from receiving additional evidence on the issue upon reconsideration, and likewise were barred from reaching a different conclusion on the factual question. Since the Commissioners specifically found that the proposed plat met all requirements of the platting statute and the County Code, respondents maintain the Commissioners are therefore compelled to approve the application. This argument misconstrues the nature of the SEPA mandate for environmental consideration, and the scope of the Shorelines Hearings Board's jurisdiction.

[2] The Board's jurisdiction under the Shoreline Management Act of 1971 in this case was to determine whether the request for a substantial development permit is consistent with the County's Shorelines Master Program and the provisions of the SMA. RCW 90.58.140(2)(b). The act provides for direct regulation of activities within the "shorelines" of the state, which are defined to include the lands extending landward for 200 feet from the high water mark. RCW 90.58.030(2)(d), (f). In making its determination whether a permit for development within this shoreline may issue, the Board is subject to the mandates of SEPA to consider environmental concerns. *Sisley v. San Juan County*, 89 Wn.2d 78, 569 P.2d 712 (1977). It is likewise empowered by SEPA to deny or condition the permit application on the basis of specific adverse environmental effects discovered in the process of these deliberations. *See Polygon Corp. v. Seattle, supra;* RCW 43.21C.060. The scope of the Board's jurisdiction, however, is not broadened by the provisions of SEPA. The Board is empowered to

determine whether a shoreline substantial development permit should issue, and its deliberations under SEPA are confined to that purpose.

This fact was recognized by the Board in its final findings, conclusions and order. The Board specifically stated it was reviewing the denial of the shoreline permit "within the context of the Shoreline Management Act. . . . Other requirements and approvals for the proposal must nonetheless be met before the proposal can proceed." The Board also limited its conclusions of law to determination of the consistency of the proposal with the County's Master Program and the Shoreline Management Act.

In short, the Board's finding that the proposed plat was adequate to protect against adverse effects to the eagles is limited in its relevance and binding effect to the narrow jurisdiction which the Board is empowered to exercise. Implicit in the Board's finding that the plat is adequate is the qualification that the finding is made *for the purposes of a shoreline development* permit. It cannot bind the County Commissioners in their determination of an entirely different question—whether the preliminary plat should be approved. This conclusion follows from the limited and differing jurisdictions of the decision-making agencies, and from the unique nature of SEPA as a supplement to the statutory authority of each agency.

In contrast to the jurisdiction of the Shorelines Hearings Board to inquire into the consistency of a proposed shoreline development with the County's Master Program and the Shoreline Management Act of 1971, the County Commissioners must inquire "into the public use and interest proposed to be served" by the plat. RCW 58.17.110. Its jurisdiction is not restricted to consideration of the project's effect on the waters and the relatively narrow strip of land bordering them. Indeed, in this case, some of the perching trees used by the eagles at Wood Point are outside the 200-foot area of the shoreline, and are therefore beyond the power of the Shorelines Hearings Board to directly regulate. *See* RCW 90.58.140, .180. These trees and the rest of

the eagle habitat are the special concern of the Commissioners in determining whether to approve the preliminary plat, however, and in considering the plat's effect on this habitat they must bring a broader view of the project to bear.

In summary, the environmental determinations mandated by SEPA are uniquely related to the particular decision being taken, and are conclusive only for that purpose. They are not binding on other decision-making bodies. To hold otherwise would allow one decision-making body to preempt the authority of any other decision-making body considering a related question to evaluate a particular environmental issue, and would foreclose independent analysis and deliberation. Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values. *See* RCW 43.21C.030.

It follows from our conclusion that the Commissioners are not bound by the finding of the Shorelines Hearings Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal, and had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagle.

II

[3] The trial court held the Commissioners' determination that approval of the plat was not in the "public interest" was an unconstitutionally vague application of the platting statute. Since we are not concerned here with a regulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standards, the vagueness doctrine as such is not applicable. *See Blondheim v. State*, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975). We interpret the trial court's conclusion to be a determination that the authority granted to the Board of Commissioners to deny a plat in the public interest does not meet constitutional standards for a delegation of legislative power. As

noted above, the Commissioners' authority to deny the plat on environmental grounds derives essentially from SEPA, and not from the platting statute alone.

[4] The validity of SEPA as a delegation of substantive legislative authority to apply its standards in a particular case was specifically upheld in *Polygon Corp. v. Seattle, supra* at 66. The court held that SEPA provides constitutionally adequate guidelines for governmental decision making under the act, and that procedural safeguards are adequate if an opportunity to be heard is provided, and judicial review of the entire record is available. That is the case here. We therefore conclude there is no constitutional objection to the Commissioners' exercise of their authority under SEPA to deny the plat on environmental grounds.

III

[5] The remaining issue is whether the trial court erred in its determination that denial of the plat on the ground it was inadequate to protect the eagle habitat was an unconstitutional taking of private property for public use, in violation of Const. art. 1, § 16 and the fifth amendment to the United States Constitution. As a preliminary matter, the Commissioners raise the question whether the taking provisions apply in this case, since the property at issue is owned by the State. Under the rule of *Moses Lake School Dist. 161 v. Big Bend Community College*, 81 Wn.2d 551, 503 P.2d 86 (1972) there can be no unconstitutional taking when the property taken is public and not private. While this rule may preclude respondent Department of Natural Resources from complaining, Lake Lawrence, Inc., as lessee of the land, has a private real property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation.

[6] The determination whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interests against the public interest in imposing the regulation in question. *Maple Leaf Investors, Inc. v. Department of Ecology*, 88

Wn.2d 726, 565 P.2d 1162 (1977). In considering the encumbrance on the property owner, the court will consider both the type of encumbrance imposed and whether the owner is thereby prevented from making a profitable use of the property.

Of crucial importance in this case is the fact that the Commissioners' decision to deny the plat leaves open the possibility of approving a less dense development of Wood Point. The Commissioners have consistently maintained they would entertain an application for a plat which provided an adequate buffer zone for protection of the eagles' preferred perching and feeding areas. It should be noted that the Commissioners did not find any adverse impact from development of 11 of the proposed lots. Moreover, the findings provide specific guidelines for planning a buffer zone the Commissioners would find acceptable. Finally the decision left open the possibility of an alternate cluster configuration for the development—a configuration specifically favored by the County's Comprehensive Plan.

Thus, while it is clear the Commissioners will not approve a plat providing the single-family unit density proposed by respondents here, specifically because that degree of density does not provide adequate protection for the eagle habitat, the decision leaves open the possibility of a less dense development which would preserve the eagle perching resource. The facts apparent from the record in this case do not support a conclusion that "there is no present, possible, and reasonably profitable alternative use to which his property is adaptable." *Carlson v. Bellevue*, 73 Wn.2d 41, 51, 435 P.2d 957 (1968).

We also note there is no physical intrusion or damage created by the regulation, no public project is enhanced, and no public use of the land is created. *See Rains v. Department of Fisheries*, 89 Wn.2d 740, 575 P.2d 1057 (1978); *Maple Leaf Investors, Inc. v. Department of Ecology, supra* at 733.

The strong public policy interest being advanced by this regulation of respondent's use of the leasehold is the preservation of a valuable environmental resource which is identified as such in the County's Master Program. Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no taking in violation of the state and federal constitutions.

Our decision that the County Board of Commissioners' denial of the preliminary plat application is valid renders moot the question whether the trial court erred in issuing a writ of mandamus. We also need not reach the other assignments of error made by the appellant Commissioners. Respondents raised new questions in their briefs regarding the Commissioners' compliance with due process requirements in conducting the hearings on remand. These arguments were not made below, and the court entered no findings on the question. It is apparent, however, from the additional material provided in the Commissioners' reply brief that respondents were fully accorded due process through notice and opportunity to be heard.

Reversed.

UTTER, C.J., ROSELLINI, WRIGHT, BRACHTENBACH, DOLLIVER, HICKS, and WILLIAMS, JJ., and HUNTER, J. Pro Tem., concur.

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT DENIED BY THURSTON COUNTY TO LAKE LAWRENCE, INC.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC.,

Appellants,

v.

THURSTON COUNTY,

Respondent.

SHB No. 77-37

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of the denial of an application for a shoreline substantial development permit, came before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Robert E. Beaty, Robert F. Hintz, and Chris Smith on February 14, 15, 16 and 17, 1978 in Lacey. Board member Robert F. Hintz, being unable to attend the hearing on February 17, has read the transcript for that day.

Appellant Lake Lawrence, Inc. appeared through its attorney, Philip P. Malone; appellant, State Department of Natural Resources (hereinafter "DNR") appeared through J. Lawrence Coniff, Jr., Assistant Attorney General; respondent Thurston County, was represented by Alexander W. Mackie, Deputy Prosecuting Attorney. David Akana presided.

Appellant DNR brought a motion to remand the matter to respondent to reconsider the decision and to render a "final decision" in accordance with the requirements of the State Administrative Procedures Act ("APA"), chapter 34.04 RCW. Appellant Lake Lawrence, Inc. joined in the motion. We conclude that the motions should be denied. The APA applies only to "state" agencies. *See League of Women Voters v. King County,* SHB No. 13; *Brachvogel v. Mason County,* SHB Nos. 45, 140, 189. Administration of the Shorelines Management Act is vested in local government. RCW 90.58.050. Compliance with "state" policy is insured by the supportive and review capacity of the State Department of Ecology. *Id.* Appellants also argue that the County's decision was simply an unreasoned statement, whereas a reasoned final order was required. It may be that findings of fact and conclusions or reasons will be required for permit proceedings in the future. *See Parkridge v. Seattle,* 89 Wn.2d 454 (1978). But such requirement is not retroactively required in the instant matter. In any event, appellants could have conducted discovery or brought an appropriate motion, which they have not done. WAC 461-08-010. And since this Board reviews each appeal de novo, appellants are not materially prejudiced. The motion is therefore denied.

Respondent moved that the appeals be dismissed on the ground that the denial of the proposed plat by the County on grounds under chapter 58.17 RCW renders "moot" the request for the substantial development permit to implement the plat. The motion should be denied. While the County may have concerns for the proposed plats under chapter 58.17 RCW, it remains that a shoreline substantial development permit was denied on a particular proposal. This Board can review such denial within the context of the Shoreline Management Act. RCW 90.58.180(1). Other requirements and approvals for the proposal must nonetheless be met before the proposal

can proceed. RCW 90.58.360. The motion is therefore denied.

Counsel made opening statements; the Board viewed the site; witnesses were sworn and testified.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

Lake Lawrence is a small (approximately 339 acres in area), relatively shallow (up to 30 feet deep) lake located south of the town of Yelm in Thurston County. The State of Washington, Department of Natural Resources owns slightly over 14 acres of a shoreline area on Lake Lawrence known as Wood Point (hereinafter referred to as the "site"). DNR also owns an offshore island, the bed of the lake and the property immediately west of the site, on which the Department of Game has a public boat ramp.

II

The site is presently covered with second-growth timber and dense vegetation. Some larger "emergent" trees, scattered over the property, rise above the "canopy" formed by the smaller trees. The underbrush along the shoreline provides good cover and habitat for small animals and birds.

III

In August of 1976, the State Department of Ecology approved the shoreline master program for the Thurston County region. Therein, all of the shorelands of Lake Lawrence were designated in either rural or conservancy environments.[1]

---

[1]The Shoreline Master Program (pp. 11, 12) for the Thurston Region describes the environments as follows:

2. *Conservancy Environment*
* * *

Definition: The "Conservancy Environment" designates shoreline areas for the protection, conservation, and management of existing valuable natural resources and historic and cultural areas. This environment is characterized by low-intensity land use and moderate-intensity water use with moderate to little visual evidence of permanent structures and occupancy. Sustained management of the pastoral, aquatic and forest resources, as well as rigidly controlled utilization of nonrenewable and other nonmineral resources which do not result in long-term irreversible impacts on the natural character of the environment are permitted. Intensity of recreation and public access may be limited by the capacity of the environment for sustained recreational use.

3. *Rural Environment*
* * *

Definition: The "Rural Environment" designates shoreline areas in which land will be protected from high-density urban expansion and may function as a buffer between urban areas and the shorelines proper. This environment is characterized by low intensive land use and moderate to intensive water use. Residential development does not exceed two dwellings per acre. Visual impact is variable with a moderate portion of the environment dominated by structures or impermeable surfaces. Intensive cultivation and development of the renewable soils, aquatic and forest resources, as well as limited utilization of nonrenewable mineral resources is permitted. Recreational activities and public access to the shoreline are encouraged to the extent compatible with other rural uses and activities designated for this environment.

All of the instant site was designated "rural" in the shoreline master program. Shorelands lying west of the site have been designated as rural; shorelands lying east of the site have been designated conservancy. Much of the lake shore is platted for residential development.

IV

Lake Lawrence, Inc., an appellant herein, proposes to develop the site into single-family residences. In reliance upon the rural use designation, Lake Lawrence, Inc. leased the site from DNR for a term of fifty-five years beginning on September 1, 1976. By separate agreement, it also leased from DNR certain second class shorelands adjacent to the uplands.

V

On January 12, 1977, Lake Lawrence, Inc. applied to the Board of Thurston County Commissioners for a preliminary plat and shoreline permit to develop the site into twenty-seven residential home sites. The proposal was amended several times subsequently. A draft environmental impact statement (EIS) was prepared, public hearings were held, comments received, and a final EIS was completed and filed with the Thurston County Planning Department in May of 1977. The planning department recommended approval of the revised proposal.

After the May 27, 1977 staff report to the Land Use Committee and a Land Use Committee meeting by the Planning Commission, a site visit was arranged for all parties. The visit was held on July 1, 1977 and three eagles were observed on the site consisting to two adults and an eaglet. After the trip and discussions with the State Department of Game, the Thurston County Planning staff changed its report and recommended that the development proposal be denied. The staff also recommended that the shoreline designation be reconsidered.

On July 13, 1977, the Thurston County Planning Commission met to consider the applicant's revised proposal and the staff recommendations. The Planning Commission lacked a quorum to render a decision and forwarded the proposal to the Board of County Commissioners with no recommendation.

The Board of County Commissioners held two public hearings on the proposal, on August 17, 1977 and September 8, 1977. On September 8, 1977, the applicant submitted a proposal revising the buffer zone along the shoreline for additional protection of wildlife habitat. The revisions were made in response to environmental concerns disclosed in the EIS and particularly as to the trees which had been identified as an "eagle habitat" on the site. After the public hearing, the Board of County Commissioners called for additional written comments from the developer, the public and staff and on September

28, 1977, denied both the application for preliminary plat and shoreline permit. That decision was memorialized by a letter dated September 30, 1977 addressed to the Director of the Thurston County Planning Department, signed by the ex officio clerk of the County Commissioners. The decision, which did not include consideration of the request for a conditional use and/or variance permit for a community dock, was appealed to this Board.

VI

The proposed substantial development in its last configuration consists of creating 15 "waterfront" lots and ten upland lots. (See exhibit A-8) Three of the waterfront lots will be set aside for an "eagle preserve." A 1,000-foot long private road with a 60-foot wide right of way separates the upland and the waterfront lots. Each lot would be served by an individual septic system. Other features of the project include common driveways to adjacent pairs of lots, utility lines along boundary lines and to the community dock, common areas for picnic and walking areas and a water well, fence protection along the southern boundary, and an 88-foot long private community pier with eight 24-foot long fingers located on second class shorelands. Drainage and pedestrian access from the development is provided through the shoreland towards the lake. The development is nearly surrounded by a greenbelt area which is 75-feet wide at the shoreline and 50-feet wide at other boundaries except adjacent to the existing public boat ramp located on the western boundary. Additionally, there would be a 50-foot building setback from the 75-foot shoreline buffer.

Protective covenants and restrictions are intended which would control the removal of trees and preserve the greenbelt buffer and marsh areas. Hunting would be prohibited. Certain other covenants and restrictions are required by the DNR lease.

Lake Lawrence, Inc.'s upland lease with DNR provides for no residential construction in the buffer zone,

requires written consent prior to removal of trees in the greenbelt buffer area, restricts clearance of vegetation and fallen trees therein except for a walking path or for encouragement of natural growth of trees and vegetation and permits the construction of fences and gates along the inland west and south perimeter boundaries. The lease permits clearing of vegetation and placement of picnic tables, benches, water and sanitary facilities and outdoor cooking facilities in either the west or south buffer area for the recreational use of lot owners.

VII

Bald eagles have long been observed both in undisturbed wooded areas and on trees near residential structures at Lake Lawrence. Sightings have occurred during winter and summer months, and even during portions of the year when human activities extend to the lake for fishing and recreational purposes.

At the instant site, bald eagles have been observed perched on several preferred "emergent" trees. It is unlikely that bald eagles have used the site for nesting. It is likely that bald eagles use certain trees near the water on the site for perching while feeding at the lake. However, the lake is not a primary or critical feeding area. Such feeding areas are more likely found at the nearby Deschutes River and Nisqually River where spawning salmon can be found. At Lake Lawrence, eagle food sources include fish, which is stocked by the Department of Game, and waterfowl.

VIII

There are two types of bald eagles. One type, the southern bald eagle, is found south of the 40th parallel, and has been declared to be an "endangered species." Such designation indicates that a species' population is small or declining, or that their habitats are being destroyed. The second type, the northern bald eagle, is found north of the 40th parallel, and has recently been placed in "threatened" status, which means threatened with "endangerment."

IX

The critical aspects of eagle habitat include nesting, winter roosting and feeding areas. Although Lake Lawrence is not a primary feeding area, it is nonetheless an "incidental" perching area for eagles. Preservation of favored perching trees together with an adequate surrounding buffer would be a proper requirement for the instant development. Visual screening from ground activities is an important part of such a buffer. Noise from normal human residential activities are not ordinarily disturbing to some eagles. Human activities on the water disturb the eagles the most. According to the scientific evidence, including exhibits (R-1; R-4) and expert testimony, the setting aside of three waterfront lots (lots 3, 4, and 5) and buffer area in the shoreline for an "eagle preserve" provides adequate protection against significant adverse effect to the eagles in this proposal.

X

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Findings the Board makes these

CONCLUSIONS OF LAW

I

The denial of appellant Lake Lawrence, Inc.'s application is reviewed, after the adoption and approval of the applicable master program, for consistency with the master program and the provisions of the Shoreline Management Act. RCW 90.58.140(2)(b).

II

This Board reviews de novo the action of the County. *E.g. Brachvogel, et al. v. Mason County,* SHB No. 140. The burden of proving consistency with the Shoreline Management Act and the master program herein is upon

the appealing party. RCW 90.58.140(7). *E.g. Wallingford Community Council, et al. v. City of Seattle,* SHB No. 203.

III

The proposed substantial development (without the community dock) is consistent with the master program environment regulations for the rural designation.[2]

The proposed substantial development (without the community dock) is consistent with the master program policies for regulation of use activities for residential development provided that preservation of the remaining vegetation along the waterfront in the natural buffer is made a condition of a shoreline permit.

IV

The proposed substantial development (without the community dock) is consistent with the general policy of the master program and the provisions of chapter 90.58 RCW.

V

The propriety of the proposed community dock is not here addressed inasmuch as the conditional use or variance permit required is not now before this Board.

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[2]The Rural Environment Regulations of the master program (pp. 60 and 61) require developers to indicate how shoreline vegetation and erosion will be controlled during construction. (See also paragraph six of the master program, p. 28.) In this matter a vegetation and tree buffer will remain along the shoreline. The regulations require access and pathways upland from the ordinary high water mark to be held for common use by residents of the development. The instant development provides for such. Residential density limitations of two dwelling units per acre (28 maximum allowed herein) are met by the proposed development. (See also paragraphs eight and nine of the master program, p. 28.) The 125 foot total setback (75 feet of which is in common use) from the lake exceeds the 50-foot requirement of the master program. (See also paragraphs two, three and four of the master program, p. 27.)

VI

A permit for the project, as described herein and when conditioned as provided for in Conclusion of Law III, will be consistent with the master program of Thurston County and the provisions of the Shoreline Management Act.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters the following

ORDER

The denial of a shoreline substantial development permit is reversed and the matter is remanded to Thurston County for further proceedings.

DATED this 23rd day of March, 1978.

SHORELINES HEARING BOARD

/s/_____
DAVE J. MOONEY, Chairman

/s/_____
ROBERT E. BEATY, Member

/s/_____
ROBERT F. HINTZ, Member

/s/_____
CHRIS SMITH, Member

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation,

Petitioners,

VS.

THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION,

Respondents.

NO. 58623

PETITION FOR WRITS OF REVIEW AND PROHIBITION

APPLICATION FOR WRIT OF REVIEW

COMES Now the State of Washington, Department of Natural Resources and Lake Lawrence, Inc., through their respective attorneys, J. Lawrence Coniff, Jr., Assistant Attorney General and Philip P. Malone, and petition the above-captioned court for a Writ of Review directed to the Board of Thurston County Commissioners and above named members of said Board in Case No. 225 (1532-34B-SH-TCO-1-77), entitled Lake Lawrence, Inc., Wood Point Preliminary Plat and Shoreline Permit Applications. (Writ of Review: RCW 7.16 *et seq.*; Plats: RCW 58.17.180). That said Writ of Review requires the

above-named respondents to certify to this Court at a specified time and place a full transcript of the record and proceedings had in said cause for review herein, and thereupon the Court review the same as to a claim by said Petitioners that the Board of Thurston County Commissioners' denial of preliminary plat and shoreline permits and recommended redesignation of subject property in this case was unlawful, arbitrary, capricious and violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Twelve and the Ninth Amendment to the Washington State Constitution, and also that the recommendation that Petitioners' Wood Point property be redesignated Natural Environment entered in said proceedings be stayed pending such review.

This petition is based upon the affidavit of J. Lawrence Coniff, Jr., Assistant Attorney General, and Philip P. Malone, hereto attached and by this reference made a part of this application. It is made known that the Petitioner, Lake Lawrence, Inc. is appealing the decision of the Thurston County Board of Commissioners as to denial of shoreline permits, to the Shorelines Hearing Board and subject to the decision of the Shorelines Hearing Board that if the decision is not in favor of the Petitioners, that it requests leave to amend the Petition for Writ of Review herein to review such decision.

APPLICATION FOR WRIT OF PROHIBITION

COMES Now the above named Petitioners through their respective attorneys, and for their second claim for relief petition the above-captioned Court for a Writ of Prohibition addressed to Art O'Neal, Director of the Thurston County Regional Planning Commission, directing said respondent not to redesignate the Lake Lawrence Wood Point property as Natural Environment.

This Petition is also based upon the affidavit of J. Lawrence Coniff, Jr., Assistant Attorney General and Philip P. Malone, hereto attached and by this reference made a part of this application.

/s/_____
J. LAWRENCE CONIFF, JR., Assistant Attorney General for the Department of Natural Resources

/s/_____
PHILIP P. MALONE, Attorney for Petitioner, Lake Lawrence, Inc.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington corporation,

Petitioners,

vs.

THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, constituting THE BOARD OF THURSTON COUNTY COMMISSIONERS,

Respondents.

NOs. 58623 and 59975
(Consolidated)

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

I.

1.1 **Date.** July 28, 1978.

1.2 **Judge.** Richard L. Pitt.

1.3 **Appearances.** Petitioner State of Washington, Department of Natural Resources appeared by its attorney, J. Lawrence Coniff, Jr., Assistant Attorney General; petitioner Lake Lawrence, Inc. appeared by its attorney, Philip P. Malone; respondent Thurston County and the individual members of the Board of Thurston County Commissioners appeared by their attorney, Alexander W. Mackie; and intervenors Roy Harrison, et al., appeared by their attorney, Thomas H. S. Brucker.

1.4 **Witnesses and Exhibits.** No witnesses were called by any party. The Court has considered the record of proceedings before the Board of Thurston County Commissioners consisting of Volumes I through IV; the record of proceedings before the Shorelines Hearings Board, Docket No. 77-37 consisting of Volumes V through XII and the record of proceedings before the Board of Thurston County Commissioners on April 18 and 24, 1978, consisting of Volume XIII, all of which were admitted into evidence by stipulation of the parties.

II. FINDINGS OF FACT

The Court, being fully advised in the premises, finds:

2.1 **Shoreline Hearings Board Decision.** Lake Lawrence, Inc. leased approximately fourteen acres of a shoreline area lying adjacent to Lake Lawrence known as Wood Point for a term of fifty-five years commencing on September 1, 1976. Lake Lawrence, Inc. proposed to develop the site into single family residences in accordance with the terms of said lease and in reliance upon the rural use designation given the Wood Point site by Thurston County. The events leading to this litigation are well summarized in the final Findings of Fact made and entered by the Shorelines Hearings Board, State of Washington, in Docket No. 77-37, Findings of Fact Nos. I through IX. The Shorelines Hearings Board, after a contested hearing, fully considered all environmental impacts claimed by respondents to be applicable to petitioners' entire proposed development, and considered the impact of the proposed development on eagles, and reversed the denial of petitioners' requested permit.

2.2 **Final Environmental Impact Statement.** Since entry of the final Findings of Fact, Conclusions of Law and Order by the Shorelines Hearings Board in Docket No. 77-37 on March 23, 1978, the Final Environmental Impact Statement for the proposed development on Wood Point has not been supplemented,

altered or amended by Thurston County, the author and sponsor of said document as "lead agency.'

2.3 **Attempted Rezone During Pendency of Appeal.** While denying both the application for a preliminary plat and a shoreline permit, respondents instructed its planning staff to consider redesignation of the Wood Point site.

2.4 **County's Failure to Appeal.** After rendition of the decision of the Shorelines Hearings Board in its Docket No. 77-37, Thurston County elected not to appeal it or the Findings and Conclusions therein to the courts.

2.5 **Taking of Evidence by County.** On April 10, 1978, after receipt of the Shorelines Hearings Board's decision, the Thurston County Commissioners met on a view trip to the Wood Point site with intervenors. During their meeting at the Wood Point site, the individual commissioners voiced their disagreement with the decision of the Shorelines Hearings Board. The Commissioners received evidence at said meeting and made personal observations.

2.6 **Plat Rejection.** The Thurston County Commissioners, specifically found that petitioners' proposed project on Wood Point met all objective platting requirements, but rejected the proposed plat on the grounds of "public interest." Their decision regarding public interest was based upon environmental grounds, which were considered and decided by the Shorelines Hearings Board. The decision of the Thurston County Board of Commissioners is inconsistent with the findings of the Shorelines Hearings Board, Docket No. 77-37, on the question of whether or not Wood Point is used by eagles for nesting, winter roosting or feeding. The Shorelines Hearings Board found that Wood Point is only an incidentally used perching area for eagles and is not critical or important to their habitat needs.

2.7 **Alternative Conditions.** After denying petitioners' application for plat approval and refusing to issue the requested substantial development permit as ordered

by the Shorelines Hearings Board, respondent Board of County Commissioners thereupon entered "alternative" findings regarding the requested plat approval. These new "alternative" conditions would apply to the requested plat only if a court reversed their decision to deny it.

III. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact, the Court makes and enters the following Conclusions of Law:

3.1 **Shorelines Hearings Board Decision.** The final Findings of Fact and Conclusions of Law and Order of the Shorelines Hearings Board in Docket No. 77-37 dated March 23, 1978 are attached hereto. At the time petitioners filed their appeal, the Shorelines Hearings Board acquired jurisdiction to consider all environmental impacts of petitioners' proposed project on Wood Point under the Shoreline Management Act and the State Environmental Policy Act, and did consider the impact upon eagles in Thurston County which the entire plat would have. Judicial review of a decision of the Shorelines Hearings Board is allowed by statute. Because respondents elected not to appeal said decision, they are bound thereby. The Findings of Fact and Conclusions of Law entered by the Shorelines Hearings Board are also binding upon this Court.

3.2 **No Adequate Remedy.** Petitioners have no adequate remedy at law.

3.3 **Jurisdiction.** This Court has jurisdiction of parties and the subject matter of this action.

3.4 **Public Interest.** The "public interest" clause of the Thurston County platting ordinance and RCW 58.17.110, as applied to this case by respondents, is unconstitutionally vague and violates the due process clause of both the State and Federal Constitutions.

3.5 **Legislative Intent Re Platting.** Respondents' reliance upon authority derived from the public interest clause of the platting statutes (RCW Chapter

58.17) is improper and unwarranted. The authority conferred by such statutes relates solely to criteria for platting. The legislature declined to grant authority to deny plats on environmental grounds under the public interest clause because such matters are addressed by both the Shorelines Management Act and the State Environmental Policy Act. Respondents' refusal to issue the requested substantial development permit after they decided not to appeal the Shorelines Hearings Board's decision, *supra,* is unlawful (RCW 58.17.180). Respondents do not possess the authority to "moot" the decision of the Shorelines Hearings Board by utilizing the device of denying the requested plat approval on "environmental grounds" which were already litigated before the Shorelines Hearings Board. The legitimate purposes of the State Environmental Policy Act and the Shorelines Management Act would be subverted by such action.

3.6 **Substantial Development Permit.** Petitioners are entitled, as a matter of law, to an order requiring respondent to issue the substantial development permit as ordered by the Shorelines Hearings Board.

3.7 **Plat Approval.** Petitioners are entitled, as a matter of law, to an order requiring respondents to approve their proposed plat with the exception of the dock proposed therein, for which petitioners must secure the necessary permits.

3.8 **Rezone of Wood Point.** Petitioners have a right to rely upon the zoning of the Wood Point property as "rural" and the Shorelines Hearings Board decision, *supra.*

3.9 **Public Interest to the Use of Property.** After balancing the public interest in legitimate governmental regulation of the use of property versus the rights of petitioners to their proposed use of Wood Point, the Court concludes that alleged public interest in maintaining perching sites for eagles on the Wood Point property does not justify the denial of the proposed plat, and would constitute an unconstitutional taking.

DONE IN OPEN COURT this _____ day of September, 1978.

/s/_____
JUDGE RICHARD L. PITT

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital or otherwide infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON STATE CONSTITUTION

ARTICLE XVI
SCHOOL AND GRANTED LANDS

§ 1. All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

25 STAT. 676

SEC. 14. That the lands granted to the Territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and any portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and

fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty, to the Territory of Dakota, for an asylum for the insane shall, upon the admission of said State of South Dakota into the Union, become the property of said State.

43.79.060 University permanent fund. There shall be in the state treasury a permanent and irreducible fund known as the "state university permanent fund," into which shall be paid all moneys derived from the sale of lands granted, held, or devoted to state university purposes.

Supreme Court, U. S.
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No. 79-1844

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Petitioners,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Washington State Supreme Court (Pet. App. pp. A-1 - A-15) is reported at 92 Wash. 2d 656, 601 P.2d 494 (1979).

JURISDICTION

The Department of Natural Resources of the State of Washington, hereinafter referred to as the "Department," failed to cite a jurisdictional basis for its petition. Presumably it is

28 U.S.C. § 1257(3). The petition for certiorari is a companion case to the appeal from the same decision filed sub nom. Lake Lawrence, Inc. v. Thurston County, et al., U. S. Supreme Court No. 79-1880.

QUESTIONS PRESENTED

Whether this Court will grant a new trial on the issue of taking of state managed trust land without compensation, when:

1. No ruling of law, statute or decision of any court prevented the Department from raising the taking issue or presenting argument on the taking issue;

2. The Department fully raised and argued the taking issue below; and

3. The court below fully considered the taking claims in connection with the project denial and ruled that no taking occurred because the permit denial permits other economically useful development of the property in question.

STATEMENT OF THE CASE

A detailed statement of the case is set out in the motion to deny or affirm the appeal of Lake Lawrence, Inc. in the companion case. Errors in the Department's statement are noted in connection with the argument below.

REASONS FOR DENYING THE WRIT

The petition proceeds from an erroneous premise. When the facts are properly stated, it is clear that the court below fully considered

the property issues raised by the State, including the taking issue, and issued a decision fully consistent with decisions of this Court.

A. The Questions Raised by the State are Premature and Hypothetical.

In its petition, the Department claims the decision below should be revised by this Court because the lower court allegedly ruled:

> that the imposition of the restriction upon use in question could not be challenged by the Department of Natural Resources because " . . . there can be no unconstitutional taking when the property taken is public and not private." (92 Wn.2d at 668)

Petitioners' Brief at p. 7.

In fact, the court below stated:

> As a preliminary matter, the Commissioners [appellant Thurston County below] raise the question whether the taking provisions apply in this case, since the property at issue is owned by the state. Under the rule of Moses Lake School Dist. 161 v. Big Bend Community College, 81 Wash. 2d 551, 503 P.2d 86 (1972) there can be no unconstitutional taking when the property taken is public and not private. While this rule may preclude respondent Department of Natural Resources from complaining, Lake Lawrence, Inc., as lessee of the land, has a private real

> property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation.

Department of National Resources v. Thurston County, supra, at 668, 601 P.2d at 500; Pet. App. A-13.

The court below did not rule that the permit denial "could not be challenged by the Department" as alleged in the Department's petition. The court below did not have to reach the question of whether the Department was barred because of the presence of a proper party, a lessee, to raise the taking issue.

This Court has ruled that it is improper to pass on constitutional issues that are prematurely raised or that grow out of a mere potential impairment of constitutional rights. Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 70-81.

The language of the court below held open the door for the Department to argue in a later case that trust properties are not subject to the public property rule in Moses Lake v. Big Bend, supra. Since the issue of the Department's status as a trustee was not required to decide the case below, no present case or controversy exists on the point for this Court to resolve by certiorari. Any action by this Court at this time would be analagous to rendering an advisory opinion or declaratory judgment upon a hypothetical case. See, Watson v. Buck, 313 U.S. 387, 402.

B. Petitioner Failed to Take Advantage of Opportunities Below to Present Evidence on the Taking Issue.

The Department also argues that it should be afforded a trial on the issue of whether the land use restrictions constituted a "taking" of property without compensation, and that the failure of the State Supreme Court to grant a remand to the trial court for consideration of the taking question has violated federally secured rights of petitioners. Petitioners' Brief at p. 8.

Under Washington law, petitioner had at least three opportunities to present evidence on the taking issue and did not do so. Under such circumstances, petitioner cannot now complain that it was denied a trial on the issue.

1. Public Hearings on the Proposal.

Counsel for the Department was present at the hearings on the proposal on reconsideration before the County Commissioners. Counsel discussed at length the merits of the applicant's proposal. Counsel argued that the denial might effect a taking, but at no time did counsel for the Department or any witnesses called by it, present any facts to show that denial of the configuration requested by the applicant would render any development of the property economically unfeasible.

2. The Writ of Review.

The denial of the plat is initially reviewed on the record by a trial judge under the state's statutory writ of review process. Wash. Rev. Code § 58.17.180.

In their initial pleadings to the trial court, the Department argued that the action of the

County Commissioners was unlawful, that is contrary to state or federal law, in part because the decision constituted a taking of private property without just compensation.

The Department had a right under state law, Wash. Rev. Code § 7.16.090, to submit a bill of particulars as to facts not evident from the administrative record.

Washington courts have approved the use of trials to present facts to a reviewing court outside the record made before an agency where the matters alleged pertain to the jurisdiction or lawfulness of the conduct of any agency. See e.g., City of Bellevue v. Boundary Review Board, 90 Wash. 2d 856, 586 P.2d 470 (1978).

The Department filed no bill of particulars and requested no trial on the taking issues alleged in the case. In fact counsel stipulated that only three issues of law were to be decided by the court.

The parties hereto do stipulate as follows:

> 1. The parties agree there is one issue of law for the Court to consider; that is whether Respondents, on April 24, 1978 and thereafter, had constitutional and legislative authority to do the following:
>
> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle

habitat) having already been presented to the Shoreline Hearings Board;

(b) Make a decision on the record before the Shoreline Hearings Board and the evidence at new public hearings contrary to and in conflict with the prior Shoreline Hearings Board judgment on the same matter;

(c) Enter Findings of Fact, Conclusions of Law, and Judgment contrary to and in conflict with the Shoreline Hearings Board judgment of March 23, 1978.

Respondents' Stipulation and Order on Issues Under Review at p. 1 (Thurston County Superior Court Cause No. 58623), (see, Lake Lawrence, Inc. v. Thurston County, U.S. Supreme Court No. 79-1880 App. to Jurisdictional Statement at p. A-108.)

After the hearing in which the case was submitted on the record and the stipulation, the trial judge ruled in petitioners favor only to be overturned by the Supreme Court on all three questions.

The Department implies that the issue of right to trial on the taking issue was reserved in the stipulation upon which this matter was decided. (See Petitioners' Brief at p. 5) The implication is a misstatement as to the stipulation. Only the issue of liability and the amount of damages were reserved for future determination.

> 3. If the answer to the issue posed in item one (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), then the matter of damages of the Petitioner will be scheduled for a separate hearing before the Court, without prejudice to any defense, legal or equitable, which may be raised by Respondents herein.

Respondents' Stipulation and Order on Issues Under Review at p. 2 (Thurston County Superior Court Cause No. 58623), (see, Lake Lawrence Inc. v. Thurston County, U.S. Supreme Court No. 79-1880 App. to Jurisdictional Statement at p. A-109.)

The taking issue was an issue going to the merits of the lawfulness issue under Wash. Rev. Code § 58.17.180 and was therefore properly the subject of a trial if deemed appropriate by counsel under Wash. Rev. Code § 7.16.090. Counsel elected to proceed without such a trial.

3. The Mandamus Petition.

When the County Commissioners denied the preliminary plat for the second time, the Department filed for writ of mandamus to force issuance of the plat alleging, in part, that failure to do so would constitute a taking of the Department's property.

The allegation as to the taking issue was a portion of the gravamen of the Department's complaint in connection with the writ of mandamus. The County duly denied the facts alleged in the complaint.

In Washington courts, a mandamus proceeding is a civil action and proceeds with all of the elements of a civil action including a trial before the court on any issues of fact. Wash. Rev. Code § 7.16.160; see, State ex rel. Close v. Meehan, 49 Wash. 2d 426, 302 P.2d 144 (1956). At trial the Department elected to call no witnesses and requested judgment on the pleadings. Again, the Department had ample opportunity to call witnesses on the taking issue, or other issues raised in its complaint, and elected not to do so.

In summary, the Department had at least three opportunities to call witnesses on the taking issue and elected not to do so. The Department cannot now seek to have this Court direct a trial which by its own choice it elected not to pursue on an earlier opportunity.

C. The Decision Below is Consistent With Decisions of This Court on the Taking Issue.

This Court has recently had several opportunities to comment on the taking issue in the context of land use decisions, Agins v. City of Tiburon, 40 CCH S. Ct. Bull. p. B2864 (No. 79-602 June 10, 1980); Kaiser-Aetna v. United States, 444 U.S. 164; and Penn Central Transportation Co. v. City of New York, 438 U.S. 104.

Taking cases necessarily involve a weighing of private and public interests and revolve on a case-by-case basis on the resolution of three essential factors.

a. The nature or importance of the public interest being protected. Agins v. City of

Tiburon, supra, at B2869; Penn Central Transportation Co. v. City of New York, supra, at 124.

b. Whether there was any public intrusion or uniquely public function served by the action. United States v. Causby, 328 U.S. 256.

c. Whether the regulation permits any economically reasonable use of the property or destroys all reasonable expectations of use. Agins v. City of Tiburon, supra, at B2869-70; Penn Central Transportation Co. v. City of New York, supra, at 124-25.

This Court has long said that land use regulations or actions which accomplish a valid public purpose, while leaving a reasonable economic use of the property to the owner do not constitute an unlawful taking even when such decisions are based on environmental or aesthetic grounds. Agins v. City of Tiburon, supra, at B2870; Penn Central Transportation Co. v. City of New York, supra at 129.

The court below followed the decisions of this Court in deciding that the actions of the County Commissioners, in denying the preliminary plat, did not constitute a taking of property.

The court below noted that in deciding such cases, the determination of whether the regulation is an unconstitutional taking,

> requires a balancing of the nature of the infringement of the private property interests against the public interest in imposing the regulation in question. . . . (Citation omitted)

Department of Natural Resources v. Thurston County, supra, at 668, 601 P.2d at 500; Pet. App. at A-13.

Specifically, the court below: (1) Recognized the need to balance the nature of the infringement of private property interests against the public interest in purposing the regulation in question; (2) Found that the denial specifically left open the possibility of less dense or alternative configuration, and that the record did not support a conclusion that there was no present possible and reasonably profitable alternative uses to which the property is adaptable; and, (3) Found that there was no physical intrusion or damage created by the regulation, no public project enhanced, and no public use of the land created. See, Department of Natural Resources v. Thurston County, supra, at 668-69, 601 P.2d at 500-501; Pet. App. at A-13-14.

In denying the taking claims, the court below said:

> The strong public policy interest being advanced by this regulation of respondent's use of the leasehold is the preservation of a valuable environmental resource which is identified as such in the County's Master Program. Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no taking in violation of the state and federal constitutions.

Department of Natural Resources v. Thurston County, supra, at 670, 601 P.2d at 501; Pet. App. at p. A-15.

The standards and factual criteria used by the court below in support of its decision are consistent with the decisions of this Court.

CONCLUSION

The errors complained of in the petition are based upon hypothetical questions which had no effect on the outcome of either the case below or any future cases. The issues decided by the court below were decided in accordance with the decisions of this Court. The petition raises no substantial federal question under 28 U.S.C. § 1257(3) and should be denied.

DATED this 30th day of June, 1980.

Respectfully submitted,

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Certificate of Service

Alexander W. Mackie, duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States, hereby certifies in compliance with Rule 33(b) that he has caused to be served on all parties required to be served herein on June 30, 1980, three copies of the Brief of Respondent in Opposition by placing the same in an envelope, addressed as below set forth, and by depositing the same in the Post Office of the City of Olympia,

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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INTRODUCTORY STATEMENT

Pursuant to Rule 22, petitioner Department of Natural Resources of the State of Washington files this reply brief to address arguments made by Thurston County to which we have not yet had the opportunity to respond. The Department of Natural Resources desires to briefly state its position regarding the significance of *Agins v. City of Tiburon*, 65 L. Ed. 2d 106 (decided June 10, 1980), because this decision was not handed down at the time our petition for a writ of certiorari was filed.

ARGUMENT

A. The Department of Natural Resources and its lessee were not afforded the opportunity to present evidence in a judicial forum on the taking issue.

Thurston County contends that the Department of Natural Resources and its lessee have had at least three opportunities to present evidence on the taking issue in the course of proceedings and failed to do so. (Respondents' brief in opposition, page 5). This statement is simply untrue. The Department of Natural Resources and its lessee, Lake Lawrence, Inc., found it necessary to petition the superior court requesting judicial relief for damages arising from Thurston County's denial of the requested plat under the guise of "public interest." (A-94 - A-100, Application for Writ of Mandamus, Damages, Attorney's Fees and Costs).[1] The paramount issue raised by our petition for a writ of certiorari involves the question of the "taking or damaging" effect of Thurston County's action in denial of the requested plat. Until such time as Thurston County's decision became final, it would have been premature for either the Department of Natural Resources or its lessee to have challenged possible county action in a court of competent jurisdiction. This action was brought after final denial of application for plat approval and refusal to issue the requested substantial development permit as ordered by the State Shorelines Hearings

[1]References are to appendix material in the companion appeal, *Lake Lawrence, Inc. v. Thurston County*, October Term, 1979, Docket No. 79-1880.

Board. (Trial Court Finding of Fact 2.6 and 2.7, A-120 and A-121). Further, Thurston County's suggestion that the Department of Natural Resources and its lessee should have presented evidence and arguments on the "taking and damaging" effect of a possible county decision to the county itself defies logic. Suffice it to say that "appropriate means" were sought to review Thurston County's action in this case. (State Supreme Court Opinion, A-190).

B. **The parties' stipulation does not preclude consideration of the "taking" issue.**

Thurston County accuses the Department of Natural Resources of making a "misstatement as to the stipulation" (Respondents' Brief in Opposition, page 7). The county argues that the legal effect of the stipulation was to preclude the Department of Natural Resources and its lessee from litigating the taking issue. The problem of just who is making a misstatement should be resolved by considering that the stipulation relates solely to the first cause of action—Thurston County Cause No. 58623—and not to the second cause of action in which challenge was made to the county's "taking" of the property in question by virtue of its decision based upon the alleged need to preserve eagle habitat. Thurston County Superior Court Cause No. 59975 is the mandamus action which raises the "taking or damaging" issue. The trial court entered an order consolidating the two separate actions on July 6, 1978 (A-111)

which is the *same day* as the stipulation was executed by counsel for all parties.

A further point deserves mention. Thurston County's belated perception of the legal significance of the stipulation overlooks its very terms. The stipulation (A-107 through A-109) provides:

> "3. If the answer to the issue posed in item (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), *then the matter of damages of the petitioner* will be scheduled for a separate hearing before the court, without prejudice to any defense, legal or equitable, which may be raised by respondents herein." (Emphasis supplied)

The authority of Thurston County to deny the requested plat upon environmental grounds already litigated before the State Shorelines Hearings Board was the first question to be decided. All questions relating to damages arising from the county's action were to be resolved at a separate hearing to be held at a later date.[2] This is the plain import of the language used. The suggestion that the stipulation precluded later consideration of the taking issue is at variance with fact.

C. *Agins v. City of Tiburon*, 65 L. Ed. 2d 106, (decided June 10, 1980), confirms the presence of a substantial federal question raised in this case.

Subsequent to filing the petition for a writ of

[2]In fact this hearing has never been held. This is the gist of the relief sought by the Department of Natural Resources. The court below erred by resolving the taking and damaging issue against petitioner without an evidentiary base.

certiorari to the Washington State Supreme Court in this case, *Agins v. City of Tiburon, supra,* was handed down. While the Court in *Agins* held that there was no controversy regarding specific application of the City zoning ordinance, the long settled and established constitutional principles relative to this issue were discussed.

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land * * * The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken * * * the question necessarily requires a weighing of private and public interests. (65 L. Ed. 2d at 112; citations omitted)
> * * *
>
> "Although the (zoning) ordinances limit development, they neither prevent the best use of appellants' land, * * * nor extinguish a fundamental attribute of ownership * * *"
> (65 L. Ed. 2d at 113; insert by author)

It is not contested that the State Shorelines Hearings Board found that Wood Point is only an incidentally used perching area for eagles and is not critical or important to their habitat needs. (Board decision, A-57, *et seq.*; Trial Court Finding of Fact 2.6, A-120 and A-121). The Department of Natural Resources suggests that Thurston County's action is a taking

because it does not substantially advance a legitimate state interest. Under these circumstances, the county's act of holding additional hearings and making independent and contradictory findings regarding alleged critical eagle habitat ought to mean that the public at large rather than the property owner should bear the burden of the dedication of this land to this public use, *i.e.*, preservation for eagle habitat. Thurston County's denial of the requested plat and refusal to issue the substantial development permit as ordered by the State Shorelines Hearing Board was a final decision based upon a specific proposal for residential development of Wood Point. It was not, as the State Supreme Court said, a decision which "* * * left open the possibility of an alternate cluster configuration for the development—a configuration specifically favored by the County's Comprehensive Plan." (A 199) This is not so. The trial court entered an unchallenged finding of fact pertinent to the finality issue:

> "2.7 *Alternative Conditions.* After denying petitioners' application for plat approval and refusing to issue the requested substantial development permit as ordered by the Shorelines Hearings Board, respondent Board of County Commissioners thereupon entered 'alternative' findings regarding the requested plat approval. These new 'alternative' conditions would apply to the requested plat only if a court reversed their decision to deny it." (A-121)

Thurston County has done nothing more than indicate an expression of a possible future intent

should a renewed request be made by petitioner or its lessee. Thurston County attempted to rezone Wood Point during the pendancy of judicial proceedings below to a "conservancy" status. The County's attempted rezone was enjoined by the trial court. (A-41 through A-43)[3] Thurston County has denied a requested plat which meets all of the objective criteria of their platting ordinance (Trial Court Finding of Fact 2.6, A-120). The Department of Natural Resources and its lessee have been prevented from developing and using Wood Point in a manner consistent with the general zoning ordinance authorizing residential development as a "rural use." (Trial Court Finding of Fact 2.1, A-119).

[3]The County's continuing effort to rezone Wood Point is shown by the statement filed by the director of its planning department November 5, 1979. (A-241 and A-242). See also: Order Denying Application for Writ of Prohibition signed by the Chief Justice of the Supreme Court of Washington (A-243 and A-244).

CONCLUSION

In our request for review the Department of Natural Resources has demonstrated there is a substantial federal question regarding the ability of Thurston County to impose land use restrictions which would severely reduce the future income stream from these federal trust properties. We suggest that the State Supreme Court was in error in denying the Department of Natural Resources standing, as trustee of such land, to contest the imposition of use restrictions based on alleged need to protect eagle habitat.[4] We further demonstrated that both the Department of Natural Resources and its lessee are entitled by the Fifth Amendment and the Fourteenth Amendment to protections against the taking and damaging of their legitimate property interests without compensation and without an opportunity in a judicial proceeding to challenge the land use restriction. The recent decision of this Court in *Agins v. City of Tiburon, supra,* suggests that application of environmental restraints upon the proposed development of the school trust land would equate to a "taking" in the constitutional sense. Petitioners will not share with other adjacent property owners in the benefits and burdens of the County's exercise of power to impose environmental prohibitions for the alleged protection of eagles. School trust land was singled out by the County for preservation. A substantial federal question is presented in a case such

[4]See: *Alamo Land & Cattle Co., Inc. v. State of Arizona,* 424 U.S. 295, 47 L. Ed. 2d 1, 96 S. Ct. 910 (1976).

as this where the effect of the County's decision is to preclude any practical human use of Wood Point. (Trial Court, memorandum opinion, A-116 and A-117).

For these reasons, the judgment of the Supreme Court of Washington should be reviewed and reversed. The court below should be directed to remand this proceeding to the trial court for a full evidentiary hearing on the "taking and damaging" issues.

DATED this 19th day of September, 1980.

Respectfully submitted,

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